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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Marriage of BUENAVENTURA F. and BERNADETTE M. REYES.	B217033 (Los Angeles County Super. Ct. No. NED064206)
BUENAVENTURA F. REYES, Respondent, v. BERNADETTE M. REYES, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Nori Anne Walla, Judge. Affirmed.

Bernadette M. Reyes, in pro. per., for Appellant.

Law Offices of Charles L. Smith, Charles L. Smith for Respondent.

This appeal concerns the division of assets after marital dissolution. The trial court found that it had no jurisdiction over any of the marital property in dispute because the domicile of the marriage was the state of New York, and only respondent Buenaventura Reyes (husband) moved to California while appellant Bernadette Reyes (wife) continued to reside in New York. Pursuant to *In re Marriage of Roesch* (1978) 83 Cal.App.3d 96 (*Roesch*), for the court to have jurisdiction to treat separate property in a common law state such as New York as quasi-community property in California (see Fam. Code, § 125), not only must the dissolution action take place in California, but *both* parties must also be domiciled in California at the time of dissolution, which was not the case here.

We agree with the trial court's application of *Roesch* and the finding that it lacked jurisdiction over the division of property. Also unavailing is wife's complaint about the court's order that she contribute $4,000 toward husband's attorney fees and costs.

FACTUAL AND PROCEDURAL SUMMARY

The parties married in February of 1971 and separated in June of 1989. Husband served in the Coast Guard from 1967 to 1987 and then retired. Husband's entire pension was accrued while he was a resident of New York. Wife is a registered nurse and has a New York State Nurses Pension Plan. Both parties were residents of New York throughout the marriage, and wife continues to be a resident of New York. She has never lived in California. After their separation in June of 1989, husband moved to California and in January of 1990 filed for dissolution of marriage in California.

Husband's petition for dissolution of marriage noted, in pertinent part, that two minor children resided with wife and that husband knew of no community or quasi-community property assets or obligations subject to disposition by the court. In July of 1990, the court granted husband's request to enter a default, and in August of 1990 it entered a "Status Only Judgment" and reserved jurisdiction over all other issues. In September of 1990, wife filed a notice of appeal from the default judgment. In September of 1993, the Court of Appeal, Second District, Division One, affirmed the judgment.

Meanwhile, in January of 1991, wife filed an action in New York, seeking custody of the children, child support, spousal support, exclusive use and possession of "the marital residence" in New York, husband's continued maintenance of health and life insurance for the benefit of wife and children, and the equitable distribution of marital property. In June of 1991, the New York court recognized the Status Only Judgment of the California court. In September of 1991, a New York court ordered child support. In November of 1994, the trial on the issues of child support, spousal support, equitable distribution of assets, and counsel fees concluded in New York. The trial judge took the matter under submission, but subsequently became ill and never rendered a decision. Clerical and procedural complications ensued. Finally, in August of 2000, a New York court denied wife's request to restore the original case to the calendar, but suggested that wife could initiate a partition action to place the issue of equitable distribution before the court.

In May of 2002, wife filed in California a motion for the division of unadjudicated assets; a month later husband also filed in California a similar motion. In July of 2003, both motions were taken off calendar by the parties. However, in February of 2004, wife again filed a motion for the division of unadjudicated assets, specifically seeking a portion of husband's military retirement plan and savings bonds purchased during marriage with community property. Husband opposed wife's motion and sought attorney fees and costs pursuant to Family Code section 271 and Code of Civil Procedure section 128.5. Additional pleadings and argument followed on the issue of unadjudicated assets.

On May 23, 2005, the court filed a memorandum of decision recounting the history of the litigation and found, in pertinent part, that wife may bring her motion for division of unadjudicated assets before the court in California, but that the court had before it insufficient evidence regarding the division of certain community property assets and thus "reserve[d] jurisdiction on the division of those assets pending further hearing" on the matter. After a number of continuances and additional pleadings and declarations by the parties, counsel agreed that the court address the following issues: a $10,000 annuity; three motor vehicles; a bank account balance of $2,000; savings bonds

with a face value of approximately $12,000; husband's military pension plan; wife's New York State Nurses Pension Plan; and attorney fees and costs.

On December 22, 2008, the court filed a memorandum of decision in which it found that it was previously in error when it stated that California had jurisdiction to divide the parties' assets. The court noted, in pertinent part, that both parties relied on *Roesch*, *supra*, 83 Cal.App.3d 96, for the proposition that the court had no jurisdiction. Wife asserted the court had no jurisdiction to adjudicate her pension, but could adjudicate husband's military pension because it followed the domicile of the pension holder. Husband argued that the court had no jurisdiction over any marital property. The court agreed that it lacked jurisdiction under *Roesch*, and denied wife's motion for division of unadjudicated assets on the ground that the domicile of the marriage was New York, husband alone moved to California and instituted dissolution proceedings, and wife continued to reside in the state of New York.

On April 21, 2009, the court filed its findings and its order on wife's motion for division of unadjudicated issues and on husband's motion for attorney fees. The court found that notwithstanding its prior reservation of jurisdiction over "all other issues" at the time of the "status only judgment," it "did not then have jurisdiction over property issues pursuant to [*Roesch*, *supra*, 83 Cal.App.3d 96,] due to the fact the domicile of the parties' marriage was New York and [wife] never left New York." The court also found that it "was in error" in its May 23, 2005, memorandum of decision when it stated "that California has jurisdiction to divide those assets," and it vacated that finding as "an error of law" in light of the holding in *Roesch*. It thus denied wife's motion for the division of unadjudicated assets on the basis that California "has no jurisdiction over any of the marital property."

Regarding husband's request for attorney fees and costs pursuant to Family Code section 271, the court found the request warranted in light of several fundamental deficiencies in wife's arguments. First, wife pursued a claim for 100 percent of the $10,000 annuity, but presented no documentation or court order to support her claim that husband should have paid child support prior to the commencement date of the

New York court order, and she presented no documentation regarding the community expenses she claimed she paid. Wife thus sought to litigate an issue based upon a claim for which she had no substantiating evidence. Second, wife sought reimbursement for certain values she attributed to motor vehicles acquired during the marriage, but she failed to give the statutory notice of an alternate valuation date (Fam. Code, § 2552), and she presented no documentation to substantiate any value for the vehicles at the time of trial. Third, wife sought 100 percent of the bank account funds on the basis that (1) husband failed to pay child support prior to the New York court order directing payment and (2) she paid various community expenses with those funds, but wife failed to present any documentation of those expenses to support her claim. Finally, the court noted that wife's conduct in requesting the court to ignore *Roesch, supra,* 83 Cal.App.3d 96, as to husband's pension plan but to follow that case as to her pension plan also constituted conduct within the meaning of the award of attorney fees and costs under Family Code section 271.

Accordingly, the court ordered wife to contribute $4,000 toward payment of husband's attorney fees and costs. The court had previously noted that husband's attorney fees amounted to approximately $25,000. The court had also previously observed that wife's income and expense declaration of July 2008 revealed that her gross monthly income was approximately $8,000, that she had $15,550 in cash and checking accounts and $250,300 in stocks, bonds and other liquid assets, and that she had $145,000 of equity in her home.

Wife appeals. She contests the court's finding of its lack of jurisdiction and its application of *Roesch, supra,* 83 Cal.App.3d 96, and seeks a reversal of the order denying the division of unadjudicated property and awarding attorney fees and costs to husband.

DISCUSSION

I. The trial court correctly found that it lacked jurisdiction over the division of the marital property, and it properly applied Roesch, supra, *83 Cal.App.3d 96.*

Ordinarily, property acquired by spouses domiciled in a common law state is the acquiring spouse's separate property, and it does not automatically become community

property just because the spouses later establish a California domicile. Reclassification of separate property into community property simply because of a change of domicile would amount to an unconstitutional deprivation of vested property rights. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) (Hogoboom & King) ¶ 8:535; see *Estate of Thornton* (1934) 1 Cal.2d 1, 5.) Nonetheless, common law separate property can be characterized as "quasi-community property"—and thus part of the community estate (Fam. Code, § 63) and not treated as separate property (Fam. Code, § 2502)—in a marriage dissolution proceeding in California between two now-California domiciliary spouses. (Hogoboom & King, *supra*, at ¶¶ 8:536-8:537.)

For the purposes of property division in marital dissolution proceedings, "quasi-community property" is, in pertinent part, real and personal property, wherever situated, which would have been community property had the owner spouse been domiciled in California at the time of acquisition. (Fam. Code, § 125.) However, fundamental to the treatment of common law separate property as quasi-community property in California is the requirement, which is absent here, that *both* spouses must have established a California residence. This requirement is made clear by two cases, *Addison v. Addison* (1965) 62 Cal.2d 558 (*Addison*) and *Roesch*, *supra*, 83 Cal.App.3d at pages 106-107, which inform our analysis.

In *Addison*, husband and wife were married in Illinois, moved to California 10 years later, and brought certain assets with them. Years later, wife filed for dissolution of the marriage. At trial, she sought to apply quasi-community property legislation in support of her claim to certain marital property. (*Addison*, *supra*, 62 Cal.2d at p. 561.) Wife argued that "the property presently held in [the husband's] name was acquired by the use of property brought from Illinois and that that property would have been community property had it been originally acquired while the parties were domiciled in California." (*Id.* at pp. 561-562.)

The Supreme Court in *Addison* upheld the constitutionality of the quasi-community property legislation, and rejected husband's claims of violations of federal due process rights and the privileges and immunities clause. "The legislation under

discussion . . . makes no attempt to alter property rights merely upon crossing the boundary into California. It does not purport to disturb vested rights 'of a citizen of another state, who chances to transfer his domicile to this state, bringing his property with him. . . .' [Citation.] Instead, the concept of quasi-community property is applicable only if a divorce or separate maintenance action is filed here after the parties have become domiciled in California." (*Addison, supra*, 62 Cal.2d at p. 566.) Moreover, "Clearly the interest of the state of the current domicile in the matrimonial property of the parties is substantial upon the dissolution of the marriage relationship. . . . 'Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.'" (*Id*. at p. 567.)

In *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 593, the Supreme Court commented on its prior opinion in *Addison* and observed: "Prior to 1961, a wife could not, upon obtaining a decree of divorce or separate maintenance, secure any interest in property that her husband had acquired in a common law state. California's 1961 quasi-community property legislation . . . effectively reclassified as community property any common law separate property that would have been community property if it had been acquired by a California [domiciliary]. *Addison* upheld the constitutionality of applying that legislation to spouses who came to California, resided here, and then separated prior to the effective date of the legislation, so long as the trial was held subsequent to that date."

In *Roesch, supra,* 83 Cal.App.3d 96, a case that is factually similar to the present case, the Court of Appeal applied the principles in *Addison.* The parties in *Roesch* had lived in Pennsylvania, a common law state, almost their entire married lives. They separated after 26 years of marriage. After they separated, the husband changed his domicile to California. The wife and the parties' minor son remained in Pennsylvania. The husband petitioned for dissolution of the marriage in California, and the case went to trial. (*Roesch,* at pp. 99-102.)

On appeal, the wife in *Roesch* argued that the trial court's division of certain assets which it had characterized as quasi-community property was improper. (*Roesch, supra,*

83 Cal.App.3d at p. 106.) Citing *Addison*, the appellate court explained that the statutes "expanding the definition of community property could constitutionally be applied in cases meeting two prerequisite conditions: (1) both parties have changed their domicile to California, and (2) subsequent to the change of domicile the spouses sought in a California court legal alteration of their marital status. Unless both of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification [of property] without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment." (*Roesch*, at pp. 106-107.) The court concluded that application of California's quasi-community property statute was improper since both parties had not changed their domicile to California. The court reasoned, "Under these facts, the interest of California in the marital property of the parties is minimal, while that of Pennsylvania is substantial. Moreover, as a domiciliary of Pennsylvania, wife is entitled to the protection of the laws of that state." (*Id.* at p. 107.)

In the present case, wife has not cited any California cases that have rejected the analysis in *Roesch*, and we find no justification for abandoning the sound reasoning of that decision. Nor is there any merit to wife's notion that because the August 1990 "dissolution of status only judgment" declared that the court reserved jurisdiction over all other marital issues (see Fam. Code, §§ 2337, subd. (d), 2550), it could subsequently divide the unadjudicated property as sought by wife. The court could only reserve jurisdiction over an issue concerning which it has any jurisdiction in the first place. As discussed above, pursuant to *Roesch*, *supra*, 83 Cal.App.3d 96, the court had no jurisdiction to adjudicate disputed property rights because the domicile of the marriage was New York and wife was never a California resident. The court below simply could not reserve any jurisdiction it never had.

Similarly, legislation (Fam. Code, § 2556) and case law (e.g., *In re Marriage of Allen* (1992) 8 Cal.App.4th 1225, 1229-1230; *Lewis v. Superior Court* (1978) 77

Cal.App.3d 844, 849-852), which note the Family Court's continuing jurisdiction to award unadjudicated assets, presume the jurisdiction to do so in the first place. As previously discussed, the trial court did not have such jurisdiction under *Roesch*, *supra*, 83 Cal.App.3d 96.

The lack of jurisdiction under *Roesch*, *supra*, 83 Cal.App.3d 96, applies to any unadjudicated asset, including husband's military pension. (See *In re Marriage of Jacobson* (1984) 161 Cal.App.3d 465, 472 [distinguishing *Roesch* because it did not address consent to jurisdiction].) A court "may" have jurisdiction to apply California law to military retirement benefits if it otherwise has jurisdiction over the retiree because his residence (other than by military assignment) or his domicile is in the jurisdiction of California, or because he consents to the jurisdiction of the court. (*Id.* at p. 470; see 10 U.S.C. § 1408.)[1] Federal law provides that a "a court *may* treat disposable retired pay payable to a member . . . either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court*." (10 U.S.C. § 1408(c)(1), italics added.) Jurisdiction over a spouse's military pension is thus permitted, but is not mandated and is specifically dependent upon state law. In California, under *Roesch*, such jurisdiction is precluded in the present situation because wife is not a resident of this state.

Husband also argues that none of the three criteria in 10 United States Code section 1408(c)(4) factually apply here. Husband points out that his residence in California was initially because of military assignment through the Coast Guard. He also urges that his domicile for the purposes of marital property is New York. However, because section 1408(c)(4) permits but does not require state jurisdiction and *Roesch*

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[1] Title 10 of the United States Code, section 1408(c)(4) provides as follows: "A court may not treat the disposable retired pay of a member [in accordance with state law for the division of property between the member and his spouse] unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court."

precludes jurisdiction here, we need not resolve the merits of those two arguments by husband. The third possibility for jurisdiction under section 1408(c)(4), husband's consent to jurisdiction, is unavailing. He did not consent to jurisdiction over marital property because his petition for dissolution asserted there was no marital property in California and claimed New York was the jurisdiction for the marital property. The situation here is thus unlike that in *In re Marriage of Jacobson*, *supra*, 161 Cal.App.3d at page 470, where husband consented to the court's jurisdiction by signing a stipulation and filing a response to the petition for legal separation in which he listed his naval pension as community or quasi-community property.

Accordingly, the trial court correctly found that it lacked jurisdiction over the division of the marital property.

II. Attorney fees.

Wife contends that the order to contribute $4,000 to husband's attorney fees should be reversed, and that she should recover attorney fees and costs she incurred. We find no abuse of the court's broad discretion in its order requiring wife to contribute toward the approximately $25,000 of husband's attorney fees and costs.

Wife argues that the $4,000 award of attorney fees frustrates the adjudication of undivided marital property and is contrary to public policy. She faults husband for his belated claim of the lack of jurisdiction, asserts his consent to jurisdiction, and complains about the financial and physical toll on her. However, such arguments do not establish that the court abused its broad discretion or otherwise erred in its award of attorney fees.

Nor is there any basis for wife's assertion that the court abused its discretion in finding her conduct within the meaning of Family Code section 271.[2] Wife's arguments

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[2] Family Code, section 271, subdivision (a) provides as follows: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all

regarding specific items of property were fundamentally deficient because she failed to present adequate documentation and substantiating evidence. The trial court aptly noted such deficiencies, as well as wife's inconsistent legal arguments regarding the application of *Roesch* to her pension only, but not to husband's pension. Regarding wife's notion that she should have been awarded attorney fees, her request was properly not considered by the trial court because she failed to comply with the applicable rules of court and did not submit an attorney declaration.

Accordingly, the trial court did not err in its award of attorney fees.

DISPOSITION

The April 21, 2009, court order finding that it has no jurisdiction over property issues and directing that wife contribute $4,000 toward defraying husband's attorney fees and costs is affirmed. Husband is entitled to costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.

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evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."